86-432

Supreme Court, U.S.
FILED
SEP 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

CHARLES J. MILLER,
Petitioner,

vs.

U. S. MERIT SYSTEMS PROTECTION BOARD
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether a Executive Branch agency which has appointed a Federal career employee, currently on the roles of another Executive Branch agency in a position at a lower grade and rate of pay, to a permanent position in the competitive service and established a reporting date to effect that appointment without a break in service, can withdraw that appointment without affording the appointee the cause and procedure rights specified by 5 U.S.C. § 7513?

2. Whether an employee whose appointment as a GM-14 is "withdrawn" and who then reverts to his GS-13 grade, is demoted or reduced in grade?

3. Is the definition of employee in 5 U.S.C. § 7511 applied agency by agency or is a career competitive employee of a Federal executive agency an employee for all purposes?

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National Treasury Employees Union v. Reagan, 663 F.2d 237 (D.C. Cir. 1981)

Pages 10, 15,16, and 19

5 U.S.C. § 1295

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5 U.S.C. § 2105

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5 U.S.C. § 7511

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5 U.S.C. § 7512

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5 U.S.C. § 7513

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner, Charles J. Miller, prays that a writ of certiorari issue to review the opinion and judgement of the United States Court of Appeals for the Federal Circuit entered in these proceedings June 18, 1986.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Federal Circuit appears at Page A1 of the appendix. The unpublished order of the U. S. Merit Systems Protection Board is set forth at page A6. The unpublished initial decision of the Presiding Official

of the Merit Systems Protection Board is set forth at page A9.

JURISDICTION

The opinion of the United States Court of Appeals for the Federal Circuit was entered on June 18, 1986. The Petition for a Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. 1295 provides in pertinent part:

> (a) The United States Court of Appeals for the Federal Circuit for the Federal Circuit shall have exclusive jurisdiction ---

(9) of an appeal from a final order or final decision of the Merit System Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of Title 5; . . .

5 U.S.C. § 2105(a) provides in pertinent part:

(a) For the purposes of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is ---

(1) appointed in the civil service by one of the following acting in an official capacity ---
(A) the President;
(B) a Member or Members of Congress, or the Congress;
(C) a member of the uniformed services;
(D) an individual who is an employee under this section;
(E) the head of a Government controlled corporation; or,
(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;

(2) engaged in the performance of a Federal function under authority of law or Executive act; and

(3) subject to the supervision of an individual named by paragraph

(1) of this subsection while engaged in the performance of the duties of his position.

5 U.S.C. § 7511 provides in pertinent part:

(a) For the purpose of this subchapter ---
(A) "employee" means ---
(1) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less.

5 U.S.C. § 7512 provides in pertinent part:

This subchapter applies to ---
* * *
(3) a reduction in grade;
(4) a reduction in pay; . . .

5 U.S.C. § 7513 provides in pertinent part:

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as

will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to ---

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefore at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section may appeal to the Merit Systems Protect Board under section 7701 of this title.

STATEMENT OF THE CASE

On 14 April 1985 the petitioner appealed to the U. S. Merit Systems Protection Board from the action of the Securities and Exchange Commission in "withdrawing" petitioner's appointment to the position of Equal Employment Manager, GM-260-14. On 10 May 1985, the Washington Regional Office of the U. S. Merit Systems Protection Board dismissed the petitioner's appeal, Appendix A9. The Presiding Official noted that while petitioner was appointed to the position of Equal Employment Manager, GM-201-14, with the agency, "appellant never entered on duty under said appointment" and "[u]nder such circumstances, the revocation of an appointment does not constitute an adverse action as contemplated by 5 U.S.C. Chapter 75." Petitioner petitioned for review of

the Presiding Official's decision on 14 June 1985. The U. S. Merit Systems Protection Board issued its final order denying the petition for review on 4 September 1985, Appendix A6.

The petitioner, then a GS-201-13 competitive career employee with the Department of the Navy, timely and properly applied under U. S. Securities and Exchange Commission announcement number 238-34 for the position of Equal Employment Manager, GM-260-14. The petitioner was rated highly qualified for the position and interviewed by a three member panel on 25 January 1985. The petitioner was one of three individuals referred by that panel to the Executive Director. The petitioner was interviewed by the Executive Director and the Deputy

Executive Director on 5 February 1985. On 22 February 1985, the petitioner was called by the Executive Director and advised that he had been selected for the position. The petitioner accepted the position immediately. The Executive Director advised the petitioner that the Director of Personnel for the Securities and Exchange Commission would contact the petitioner either later that day or on the next workday to arrange a reporting date. On 26 February 1985, the Director of Personnel called the petitioner and the petitioner's supervisor within the Department of the Navy. At the request of the Department of the Navy, a deferred reporting date of 31 March 1985 (first workday 1 April 1985) was established. On 6 March 1985 the Director of Personnel again telephoned petitioner; this time to advise

him that, due to unspecified allegations of defects in the selection process, petitioner's appointment had been withdrawn. Petitioner was not permitted to enter on duty on 1 April 1985. By letter dated 6 June 1985 the Director of Personnel advised petitioner that another individual had been appointed to the position.

REASONS FOR GRANTING THE WRIT

1. The decision below presents a question of statutory interpretation involving the rights of Federal employees whose appointments are revoked which can be resolved only by this Court and that has been the subject of conflicting decisions from the Courts of Appeals.

The Court of Appeals for the Federal Circuit, which under 5 U.S.C. § 1295(a)(9), has exclusive jurisdiction over cases involving the revocation of appointments of Federal employees, has issued an opinion inconsistent with the holding of the Court of Appeals for the D. C. Circuit in National Treasury Employees Union v. Reagan, 663 F.2d 239 (D.C. Cir. 1981):

> We believe that the class members before us were appointed to federal jobs. In some cases, however, the appointments were properly revoked. . . . In other cases, class members were allowed to enter onto duty as federal employees. Once they did so, their appointments could not be revoked.

Id. at 253.

The reasoning of the D.C. Circuit was that the appointment of Federal employees can only be revoked or modified in accordance with statutory requirements, there are no similar statutory protections for those who are merely appointees. "[Appointees] remain, therefore, outside the protection of the statutory procedures established

for employees." Id. at 246. The reasoning of the Federal Circuit is difficult to discern. The court, asked to consider whether the appointment in question could be revoked, stated that the "issue is not presented in this case" of "whether Mr. Miller's selection was an appointment within the meaning of 5 U.S.C. § 2105(a)(1) (1982)." Decision at A2. The Federal Circuit later states, without elaboration, that: "since Mr. Miller never entered on duty in the position of Equal Employment Manager at the Securities and Exchange Commission, no viable argument can be made that he was removed or demoted from that position." As the D.C. Circuit recognized in National Treasury Employees Union v. Reagan the mechanism for hiring, removal and demotion, in the Federal Service is the appointment process. A

demotion is, legally, the revocation of an appointment at a certain grade and the reappointment of the individual to a position at a lower grade. This is certainly the fact situation presented in this case, and that the effect of the action was clearly a reduction in grade, GM-14 to GS-13, 5 U.S.C. § 7512 (3), and a reduction in pay, 5 U.S.C. § 7512 (4). The issue presented to the Federal Circuit was whether the appellant was a federal employee at the time of the revocation of his appointment and, therefore, protected by the "Cause and Procedure" requirements of 5 U.S.C. § 7513. That question is resolved by looking to 5 U.S.C. 7511, which provides the definition of "employee" for the purpose of "Reduction in Grade or Pay" and states that employee "means --- (A) an individual in the

competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less." Neither the Merit Systems Protection Board or the Federal Circuit has advanced an analysis of why the petitioner was not an employee under this definition. The Federal Circuit cited MacCarley V. Merit Systems Protection Board, 757 F.2d 278 (Fed. Cir. 1985). Decision at A4. However, beyond the fact that petitioner believes that MacCarley was wrongly decided, it is easily distinguished since it involved an appointee, not a current employee of another agency, and the application of 5 U.S.C. § 2105, not § 7511. Further, the Merit Systems Protection Board and the

Federal Circuit have, without explanation, added a requirement to the statutory language that the employee not merely be a career competitive employee but also have already reported to the new position and have performed duties in that position, before being considered an "employee" for the purposes of the statute. The D. C. Circuit in National Treasury Employees Union v. Reagan correctly determined that it is the appointment itself which is the legal event effecting the action. The statute, 5 U.S.C. § 7511, looks only to the initial appointment process by which the appointee completes his or her "probationary or trial period" and gains personal competitive status. Once that process is complete, the clear effect of the statutory language is require that any subsequent actions to withdrawn or change

the a completed appointment with regard to that employee which will have the effect of reducing his or her grade or pay must be accomplished under the constraints of the the Cause and Procedure requirements of 5 U.S.C. § 7513. Since the Federal Circuit will continue to exercise exclusive jurisdiction over these cases, the Court should review the matter and determine the actual statutory requirements.

2. The Court should grant review to address the obligation of the Federal Government to act fairly and consistently towards its employees.

In National Treasury Employees Union v. Reagan, 663 F.2d 239 (D.C. Cir. 1981), the Court of Appeals for the D. C. Circuit was

clearly critical of the way "the federal government played hide-and-seek with job-seekers, assuring them jobs awaited them and only later -- on occasion, after the prospective employee had acted on the assurance of a job -- reversing itself." Id at 246. The Court specifically stated that: "In its capacity as an employer, the federal government has a continuing obligation to act fairly and consistently towards those it seeks to hire." Id, note 8.

In this case, the U. S. Securities and Exchange Commission seeks to be neither fair nor consistent. The petitioner acted on good faith in accepting an offer made personally by the Executive Director of the U. S. Securities and Exchange Commission. The petitioner was offered and

accepted the appointment in question on 22 February 1985. At the request of his current Federal competitive service supervisor, he agreed to delay the effective date of his entry on board in the new Federal competitive service position, and therefore the effective date of his promotion and salary increase, for over a month, until 31 March 1985, in order to act in his supervisor's place, without additional compensation, while she was on extended business travel to the Western Pacific. The U. S. Securities and Exchange Commission now seeks to establish the entry on duty as the operative event in petitioner's rights to the new position and to declare that it does not owe the same obligation to the petitioner as it would owe to an employee of the Commission

who delayed reporting to the position at the request of a Commission supervisor.

In National Treasury Employees Union v. Reagan the D. C. Circuit addressed a situation in which the President had directed the withdrawal of the appointments in question for a clearly articulated reason. The D.C. Circuit carefully addressed the statutory language and processes, rejected a position vigorously asserted by the government, and limited the actions of the agencies with regard to their employees. Here, the Federal Circuit addressed an action by an agency official taken because of alleged unspecified defecting in the action. The Federal Circuit swept past the issue actually presented by the parties and its obligation to interpret the statutory

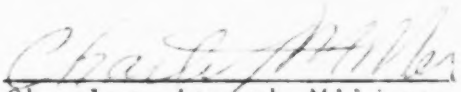
language in question and endorsed the unexplained action of the agency.

No purpose which furthers the efficiency or fairness of the Federal service is advanced by distorting the statutory language to endorse the kind of arbitrary action taken by the agency in this case. There is nothing in the statute's language or legislative history which supports the distinction between appointments of Career status employees within an agency and appointments between agencies that has been found here. The petitioner was an employee for the purpose of eligibility for the position, he was appointable because he was a current Federal employee. There is no distinction between Federal employee and agency employee in the statute, and none should be implied.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CHARLES J. MILLER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Appeal No.
	)	86-683
MERIT SYSTEMS PROTECTION BOARD,	)	
	)	
Respondent.	)	

DECIDED: June 18, 1986

Before FRIEDMAN, SMITH, and NIES, Circuit Judges.

NIES, Circuit Judge.

Charles J. Miller petitions for review of the final decision of the Merit Systems Protection Board, Case No. DC07528510287, holding that the Board had no jurisdiction to review the revocation of his appointment to the position of Equal Employment Manager, GM-260-14, with

the U. S. Securities and Exchange Commission. We affirm.

I.

Mr. Miller, while employed with the Department of the Navy, applied for an advertised position of Equal Employment Manager with the Securities and Exchange Commission which was at a higher grade than his Navy position. On February 22, 1985, petitioner was advised that he had been selected for the position and he accepted. The first workday was scheduled for April 1, 1985. On March 6, 1986, petitioner's appointment*/ was withdrawn due to unspecified defects in the

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*/ The issue is not presented in this case, and we do not decide whether Mr. Miller's selection was an appointment within the meaning of 5 U.S.C. § 2105(a)(1) (1982).

selection process. On June 6, 1985, the SEC advised petitioner that another individual had been appointed to the position.

Petitioner filed an appeal to the Merit Systems Protection Board alleging that the revocation of his appointment was, in effect, a removal, from the position which had been offered to him or was at least a demotion in grade. The Merit Systems Protection Board held that since Mr. Miller had never entered on duty under the appointment, the revocation of an appointment did not constitute an adverse action under 5 U.S.C. Chapter 75. We agree.

II.

The Merit Systems Protection Board does not have plenary authority over agency actions with respect to personnel matters. Rather, its jurisdiction is over actions made appealable by statute or regulation. Petitioner's argument that he is an employee and, therefore, entitled to appeal the revocation of the appointment misses the mark. The question is not simply whether he is an employee, but also whether there is an appealable adverse action. Since Mr. Miller never entered on duty in the position of Equal Employment Manager at the Securities and Exchange Commission, no viable argument can be made that he was removed or demoted from that position. Further, no statute or regulation provides for review by the Merit Systems Protection Board of a

revocation of an appointment to a position which an individual never occupied. The situation here is analogous to that in McCarley v. Merit Systems Protection Board, 757 f.2d 278 (Fed. Cir. 1985), involving an applicant for a position who was appointed but never entered on the duties of the position. This court held, as had the MSPB, that the MSPB had no jurisdiction to review the agency's withdrawal of the appointment because the person involved never became an employee. Similarly, petitioner Miller never became an employee of the SEC, the only agency accused of taking an adverse action.

For the foregoing reasons, the decision of the Merit Systems Protection Board dismissing petitioner's appeal of lack of jurisdiction, is affirmed.

AFFIRMED

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CHARLES J. MILLER,	)	
	)	
Appellant,	)	
	)	
v.	)	Docket Number
	)	DC0752850287
SECURITIES AND EXCHANGE COMMISSION,	)	
	)	
	)	DATE: SEP -4
Agency.	)	1985

BEFORE

Herbert C. Ellingwood, Chairman

Maria L. Johnson, Vice Chair

Dennis M. Devaney, Member

ORDER

Having fully considered the appellant's petition for review of the initial decision issued on May 10, 1985, and finding that it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, the Board hereby

DENIES the petition, See National Treasury Employees Union v. Reagan, 653 F.2d 239 (D C. Cir. 1981); Johnson v. General Services Administration, 9 MSPB 142 (1982).

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United Stated Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the

court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

ROBERT E. TAYLOR

Robert E. Taylor

Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

WASHINGTON REGIONAL OFFICE

CHARLES J. MILLER	)	
	)	Case Number
	)	DC0752850287
v.	)	
	)	DATE MAY 10
SECURITIES AND EXCHANGE COMMISSION	)	1985
	)	
	)	Joseph E. Clancy
	)	Presiding
	)	Official

DECISION

Appellant filed an appeal from the agency's alleged removal of him from the position of the Equal Employment Manager, GM-14. In this regard, the record reflects that on February 22, 1985, appellant was selected for the position in question pursuant to a posted vacancy announcement. Arrangements were subsequently made whereby appellant would

report for duty on April 1, 1985. However, on March 6, 1985, the appointment was withdrawn.

Appellant argued that the withdrawal of the appointment constituted an appealable action, 5 U.S.C. §§ 7512, 7513(d). However, appellant never entered on duty under said appointment. Under such circumstances, the revocation of an appointment does not constitute an adverse action as contemplated by 5 U.S.C. Chapter 75. National Treasury Employees Union v. Reagan, 663 F.2d 239 (D.C. Cir. 1981); Collazo v. Community Services Administration, 15 M.S.P.B. 188 (1983); Johnson v. General Services Administration, 9 MSPB 142 (1982).

In the light of the foregoing, I find that appellant has failed to meet his burden of proof with respect to the issue of the Board's jurisdiction on his appeal, 5 C.F.R. § 1201.56(a)(2). Accordingly, the appeal is hereby DISMISSED.

NOTICE

This is an initial decision and will become a final decision of the Merit Systems Protection Board on Jun 14 1985 unless a petition for review is filed with the Board.

Any petition for review must be filed with the Board within thirty-five (35) calendar days after the issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management (OPM) and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The Director may request review only if he or she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule or regulation under the jurisdiction of OPM. 5 U.S.C. § 7701(e)(2). The petition must specifically identify the exception taken to the decision, cite the basis for exception, and refer to applicable law, rule or regulation.

The petition for review must be filed with the Office of the Clerk, Merit Systems Protection Board, Washington, D.C. 20419 no later than thirty-five (35) calendar

days after issuance of this decision. If a petition for review is filed, an original and one copy should be forwarded to the Office of the Clerk.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the record was closed; or

(2) the decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Any appellant adversely affected or aggrieved by the Board's final decision may obtain judicial review, if the Court has jurisdiction, by filing a petition with the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. Such a petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the Court within thirty days of the final Board decision. 5 U.S.C. § 7703(b)(1).

For the Board:

JOSEPH E. CLANCY

Joseph E. Clancy

Presiding Official